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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 218

RUSSELL MCMAHON, et al.,
Petitioners,

v.

MILAM MANUFACTURING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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No.

RUSSELL MCMAHON, et al.,

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v.

MILAM MANUFACTURING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi entered in the above entitled case on February 27, 1961, suggestion of error having been overruled on April 10, 1961.

Opinions Below

The opinion of the Supreme Court of Mississippi (Appendix D, *infra*, pp. App. 7-24) is reported in — Miss. —, 127 So. 2d 647. The opinion of the chancery court (Appendix E, *infra*, pp. App. 25-30) is unreported. A related opinion of the Supreme Court of Mississippi in the same cause is reported in 237 Miss. 676, 115 So. 2d 328.

Jurisdiction

The judgment of the Supreme Court of Mississippi (Appendix B, *infra*, p. App. 5) was entered on February 27, 1961. A suggestion of error was overruled on April 10, 1961 (Appendix C, *infra*, p. App. 6). The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

Question Presented

Whether a state court may conclude that it has not been preempted of jurisdiction by the National Labor Relations Act and may enjoin peaceful picketing of a garment company engaged in interstate commerce on the ground that the picketing is conducted by non-employees and therefore in the state court's view does not constitute a "labor dispute" under the National Labor Relations Act.

Statutes Involved

The pertinent provisions of the National Labor Relations Act (61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.*) are set forth in Appendix A, *infra*, pp. App. 1-4.

Statement

The International Ladies' Garment Workers' Union, Local 180 (hereinafter called the Union) is the certified collective bargaining agent of employees of Texson, Inc., of San Antonio, Texas (R. 37). In February 1959, the Union went on strike against Texson to obtain a contract covering hours, wages, and working conditions (R. 2, 7, 37, 62).

Texson, Inc., is a garment manufacturer utilizing a number of contractors in the Tupelo, Mississippi, area, including the respondent herein, Milam Manufacturing Company (R. 270, 272). Milam, as Texson's contractor (R. 270, 272), receives cloth from Texson (to which Texson at all times retains title); Milam cuts and sews the cloth according to Texson's design and instructions; inserts Texson's labels in the garments; and ships the finished garments back to Texson in San Antonio, Texas, from where Texson ships them to its customers (R. 121-122, 125-126, 131-134, 147-148, 178-179, 205, 208, 227). Texson sometimes sends personnel to the Milam plant to inspect and go over the Texson garments (R. 134, 269-270). A particular area of the Milam plant is used for Texson production (R. 136-137).

In 1957-1958, 10% of Milam's total production was made for Texson, amounting to $101,596.92. In 1958-1959, the figure was 12½%, amounting to $127,478.12 (R. 256, 120-122, 124, 344).[1]

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[1] In light of these shipments to Texson across state lines, it is clear that interstate commerce is affected and that the National Labor Relations Board would assume jurisdiction (R. 7, 18, 43, 77). See *Siemons Mailing Service*, 122 NLRB 81; *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1; Section 14 (c) of the Act.

On March 6, 1959, soon after the Texson strike commenced, pickets also appeared before the Milam plant bearing the following picket signs (R. 167-170):

TEX - SON
MILAM MFG. CO.
ON STRIKE
INTERNATIONAL LADIES
GARMENT WORKERS UNION
AFL-CIO.

The picketing was carried on by two persons; there was no mass picketing (R. 170, 209). It was at all times completely peaceful and without violence (R. 153-154, 156, 161-162, 209). No vile or abusive language was used (R. 156), nor were there any threats (R. 153-154, 156, 235-236).[2]

After the picketing began, drivers employed by common carriers refused to cross the picket line, with the result that Milam itself rented a truck and picked up shipments from, and delivered shipments to the common carriers (R. 218-219, 232).

On March 16, Milam filed a bill in the Chancery Court of Lee County, Mississippi, to enjoin all picketing (R. 2-4). By answer, motions and special demurrers, defendants asserted that the state court was without jurisdiction over the subject matter because

[2] The pickets occasionally wrote down things in a little black book (R. 233-234), and two union representatives in a car sometimes followed trucks that left the premises, they in turn being trailed by a company car (R. 189-192, 197-199, 219, 221-222, 236-240). On a single occasion, the car of a union sympathizer was parked in such a manner as to make it difficult for a truck to exit from a driveway; after 10 or 15 minutes, the car was moved and the truck departed (R. 222-223, 243-252).

it involved a labor dispute affecting interstate commerce which was preempted by the Labor Management Relations Act of 1947 and fell within the exclusive jurisdiction of the National Labor Relations Board (R. 7-8, 18-19, 26, 43). On March 21, the court nevertheless issued a temporary injunction restraining the picketing (R. 11-12, 16).

On April 4, several San Antonio employees of Texson, members of the San Antonio Local 180, ILGWU, began picketing the Milam plant with picket signs stating (R. 192, 295):

> Texson employees on Strike.
> Texson by utilizing some
> of the facilities of Milam
> are attempting to destroy the
> standards of living and
> working conditions of members
> of Local Union No. 180.

On April 6, Milam filed a second bill to restrain this picketing (R. 61-63), and on the same day the court issued a temporary injunction barring the picketing (R. 64, 68-69). The next day picketing by members of another local, with very similar signs (R. 192-193, 321, 329-330, 333-334), resulted in still another bill and another temporary injunction (R. 65-66, 67, 70).

The answer filed to these bills asserted lack of state court jurisdiction and exclusive National Labor Relations Board jurisdiction on the same preemption grounds as aforementioned (R. 78).

On May 6, the several bills were consolidated (R. 17, 56) and the matter brought on for final hearing (R. 117-337). On January 14, 1960, more than eight months after the matter had been taken under advisement by the chancellor,[3] he rendered an opinion (Appendix E, *infra*, pp. App. 25-30) and entered a final decree making permanent the temporary injunctions (R. 57-58). The final decree thus permanently banned all picketing.

The preemption point was disposed of in what the chancellor characterized as his "rambling opinion" by the assertion that, although Milam admittedly "is engaged in interstate Commerce", there is no "labor dispute in this case that brings it within the meaning of this [the federal] Act" (Appendix E, *infra*, p. App. 29). The chancellor additionally held that in any event he had jurisdiction to enjoin all picketing because (Appendix E, *infra*, p. App. 29):

> "The picketing in this case was not peaceful picketing. It is true that no violence was used and very little intimidation was involved, but the information given to the public was false and defendants knew it was false."

On appeal to the Supreme Court of Mississippi, the defendants in their assignment of Errors renewed their claim of federal preemption and lack of state court jurisdiction (R. 341). On February 27,

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[3] In the interim the Supreme Court of Mississippi denied an application by the defendants to bring before it and review the proceedings below on the ground that the chancellor had failed to comply with the statutory requirement that the final decree be rendered within a specified time (R. 358). *McMahon* v. *Milam Manufacturing Co.*, 237 Miss. 676, 115 So. 2d 328.

1961, the Supreme Court of Mississippi handed down its opinion (Appendix D, *infra*, pp. App. 7-24, R. 343-359) and entered its judgment (Appendix B, *infra*, p. App. 5, R. 360) affirming the chancellor's decree. Like the chancellor, the Supreme Court of Mississippi concluded that there was no "labor dispute" within the purview of the federal Act and therefore there was no preemption (Appendix D, *infra*, p. App. 12-17); and further that all picketing could be enjoined "because of coercion and intimidation" (Appendix D, *infra*, p. App. 20).

A Suggestion of Error thereafter filed by the defendants was overruled by the court on April 10, 1961 (Appendix C, *infra*, p. App. 6, R. 361).

Reasons for Granting the Writ

1. The decision below flies directly in the face of the entire group of preemption decisions of this Court from *Garner* v. *Teamsters Union*, 346 U.S. 485, through the second *Garmon* case, *Garmon* v. *San Diego Building Trades Council*, 359 U.S. 236.[4] After *Garmon* II particularly, it can no longer be doubted that when an "activity is arguably within the compass of § 7 or § 8 of the Act, the State's jurisdiction is displaced" (359 U.S., at 246).

The court below, however, made no effort to ascertain whether the conduct complained of was arguably within the compass of Section 7 or Section 8 of the

[4] The court below, interestingly, made no reference whatever to the second *Garmon* decision which stands as "a landmark in • • • 'preemption' cases in the labor field" (concurring opinion, 359 U.S., at 250).

National Act. It disregarded that all-important test altogether. As a result, its decision is in direct conflict with the controlling decisions of this Court.

There can be no question that the Union's picketing in the instant case is arguably either within the protections of Section 7 or the prohibitions of Section 8 of the Act. It is established law that the picketing of a neutral employer, as Milam in the instant case claims to be, ordinarily constitutes a secondary boycott prohibited by Section 8(b)(4) of the Act. *NLRB* v. *Denver Building Council*, 341 U.S. 675; *International Brotherhood of Electrical Workers* v. *NLRB*, 341 U.S. 694; *Local 1976, United Brotherhood of Carpenters* v. *NLRB*, 357 U.S. 93; cf. *Local 761, International Union of Electrical Workers* v. *NLRB*, No. 321, this Term, decided May 29, 1961. Arguably, therefore, if Milam had taken its case to the Labor Board, the Union's picketing might have been found to be a violation of Section 8(b)(4) of the Act.

More likely, however, it would have been found by the Board to be an activity protected by Section 7 of the Act. This is so because of the special garment industry exemption written into Section 8(b)(4) by the Landrum-Griffin amendments in 1959. To meet the unique problems of the "contractor" system in the garment industry, Congress enacted the second proviso to Section 8(e) of the Act.[5] This proviso,

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[5] See House Report No. 1147 on S. 1555, page 40, reprinted in Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959, Vol. I, p. 944. See also, *inter alia*, statements by Senators Javits and Goldwater, 105 Daily Congressional Record 15951-15952 and 16210, reprinted in Leg. Hist., *supra*, Vol. II, pp. 1384-1385, and 1387.

among other things, expressly exempts from the secondary boycott proscriptions of Section 8(b)(4)(B) picketing directed against apparel contractors (who otherwise might be deemed secondary employers) when they are working on the goods of a manufacturer with whom there is a primary dispute.[6]

Since Milam was a contractor (R. 270, 272; *supra*, p. 3) working on the goods of a manufacturer, Texson, with whom the Union was engaged in a primary dispute, it is altogether likely that, if Milam had brought the matter to the National Labor Relations Board, as it should, instead of to a state court, as it did, the Board would have found that the Union's picketing constituted activity protected by Section 7 rather than conduct prohibited by Section 8(b)(4). The dramatic contrast between exculpation before the Board, on the one hand, and the more than two-year-old ban on all picketing by the state court, on the other, is an empirical demonstration of the logic and need for the preemption doctrine in the labor relations field.[7]

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[6] This proviso was enacted in 1959 as part of the Landrum-Griffin changes in the Taft-Hartley secondary boycott provisions. Even without the proviso, however, and under the original Taft-Hartley provisions, it is probable that a contractor in the apparel industry would have been deemed a primary rather than a secondary employer vis-à-vis a manufacturer or jobber. See colloquy between Senators Taft and Ives when the Taft-Hartley Act was being passed, 95 Cong. Rec. 8876.

[7] Contrary to the decision below, whether there was or was not a "labor dispute" within the meaning of the federal Act is not the proper criterion for application of the preemption doctrine. Furthermore, again contrary to the decision below, there unquestionably was a "labor dispute" here, as innumerable decisions of this Court make clear, despite the fact relied on by the court below that "no employer-employee relationship whatever exists [and] * * * such relationship is not susceptible of exist-

2. The effort of the court below to support a total ban on all picketing on the alternative ground of "coercion and intimidation" (*supra*, p. 7) is plainly without warrant. As shown (*supra*, p. 4) the picketing was altogether peaceful, without the slightest violence, abusive language, or threats, and was carried on by a few pickets quietly and not in mass. The court's reliance (Appendix D, *infra*, pp. App. 19-20) on the "strike" sign as being false"[8] and on the trivial matters referred to in footnote 2 of this petition (*supra*, p. 4) furnished, we submit, no basis for any injunction whatever (compare *Cafeteria Employees Union* v. *Angelos*, 320 U.S. 293) and certainly not for a total ban on peaceful picketing. It is the plain teaching of *Youngdahl* v. *Rainfair*, 355 U.S. 131, that the state court did not have authority to issue a blanket injunction banning all picketing in the absence of a "pattern of violence", certainly absent here.

3. It was held in *Amalgamated Clothing Workers* v. *Richman Bros.*, 348 U.S. 511, that federal courts are debarred from issuing injunctions to restrain state courts from acting beyond their jurisdiction in labor matters. This Court expressed confidence that state courts would respect their jurisdictional bounds (pp. 518-519), but indicated that, in case of departure, there was available "the ultimate reviewing power in this Court" (p. 521; see also p. 512).

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ing." (Appendix D, *infra*, p. App. 17). For example, *Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc.*, 311 U.S. 83; *United States* v. *Hutcheson*, 312 U.S. 219; *Local 24, Teamsters* v. *Oliver*, 358 U.S. 282; cf. *Hunt* v. *Crumboch*, 325 U.S. 821. The contrary decision of the court below is a throwback to the unlamented days of *Duplex Co.* v. *Deering*, 254 U.S. 443.

[8] This sign, it will be recalled, was replaced by another which omitted the characterization of "strike" (*supra*, p. 5). Yet this too was enjoined.

The instant case, we respectfully submit, urgently requires "the ultimate reviewing power in this Court". Indeed, we believe the departure by the court below from controlling preemption principles is so clear and irrefutable that this Court might well wish to avoid further delay by summary reversal of the decision below, a practice which has sometimes been followed in other labor cases, *e.g.*, *General Drivers, etc., Local #89* v. *American Tobacco Co., Inc.*, 348 U.S. 978; *Retail Clerks International Association, Local No. 560* v. *J. J. Newberry Co.*, 352 U.S. 987; *Teamsters, etc.* v. *Kerrigan Iron Works, Inc.*, 353 U.S. 968; *Local 429, International Brotherhood of Electrical Workers* v. *Farnsworth & Chambers Co., Inc.*, 353 U.S. 969.

Conclusion

For the foregoing reasons it is respectfully urged that this Court should issue its writ of certiorari to review the decision below.

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July 7, 1961

APPENDIX A

The pertinent provisions of the National Labor Relations Act (61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.*) are as follows:

DEFINITIONS

SEC. 2. When used in this Act—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings insures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair

labor practice, and who has not obtained any other regular and substantially equivalent employment, * * *

* * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8 (e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any

contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection (e) and section 8 (b) (4) (B) the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer,", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

APPENDIX B

Judgment of the Supreme Court of Mississippi

Monday, February 27, 1961, Court Sitting : : : : : :

RUSSELL MCMAHON, et al

41,687 vs.

MILAM MANUFACTURING COMPANY.

This cause having been submitted at a former day of this Term on the record herein from the Chancery Court of Lee County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge and decree that the decree of said Chancery Court rendered in this cause on the 14th day of January 1960 be and the same is hereby affirmed. It is further ordered and adjudged and decreed that the appellee do have and recover of and from the appellants and National Surety Corporation of New York, surety on the appeal bond herein, all of the costs of this appeal to be taxed, etc.,

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APPENDIX C

Order of Supreme Court of Mississippi Overruling Suggestion of Error

Monday, April 10, 1961, Court Sitting: : : : : :

RUSSELL MCMAHON, et al

41,687 vs.

MILAM MANUFACTURING COMPANY.

This cause this day came on to be heard on the suggestion of error filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be overruled doth order and adjudge that said suggestion of error be and the same is hereby overruled.

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APPENDIX D

Opinion of the Supreme Court of Mississippi

IN THE

SUPREME COURT OF MISSISSIPPI

No. 41,687

RUSSELL MCMAHON, et al

Vs.

MILAM MANUFACTURING COMPANY

LEE, PRESIDING JUSTICE:

The Chancery Court of Lee County, on the application of Milam Manufacturing Company, issued temporary and permanent injunctions against Russell McMahon and others, enjoining them from picketing the plant of the complainant; and the defendants appealed.

Milam Manufacturing Company, a Mississippi corporation, with its domicile at Tupelo in this State, is engaged in the manufacture of garments. Most of its production consists of garments which are made under its own label for sale to the general public. Since 1956, the company has manufactured certain garments for Texson Company, a corporation of San Antonio, Texas, and White Stag Manufacturing Company of Portland, Oregon, on a "cut, make and trim" basis, that is, these companies furnished the cloth and

the labels, with the design for the garments, and Milam cut the cloth in accordance with the patterns, sewed the same together with the trimming, and placed the labels thereon. In other words, Milam furnished the thread and its machines and the labor to make these garments. Milam shipped the finished garments in bulk directly to Texson at San Antonio, Texas, or to White Stag Manufacturing Company at Portland, Oregon, as the case might be. In advance, Texson placed its orders for spring and fall lines.

So far as ownership was concerned, there was no relationship whatever between Milam and Texson. No stockholder, officer, or director of Milam owned any stock in Texson; and no stockholder, officer or director of Texson owned any stock in Milam. Texson in no way exercised supervision or control over Milam. Only twice during the three-year period from 1956-1959 have representatives of Texson even visited the plant of Milam, and the purpose, on those occasions, was merely to become acquainted. The two plants were hundreds of miles apart. The only relationship between the two corporations was that a small percentage of Milam's total production of garments went to Texson on the "cut, make and trim" basis, as above described.

Milam's total sales for the stated years, together with the corresponding sales to Texson and the relative percent thereof were shown to be as follows: 1956-1957: Total sales $1,102,847; sales to Texson, $25,392.62, or .0230 percent. 1957-1958: Total sales, $999,178; sales to Texson, $101,596.92, or .1016 percent. 1958-1959: Total sales $1,013,819.69; sales to Texson $127,478.12, or .1257 percent. The sales to Texson for

the months of March and April 1959 were $10,619.53 and $9,241.56, respectively, whereas the sales to Texson for those months in 1958 were $13,114.39 and $8,873.26, respectively, thus showing that the sales for those two months in 1958 were greater than for 1959.

Milam's profit on its operation with Texson had approximated from 5 percent to 15 percent of the total cost thereof.

In February 1959, employees of Texson, under the leadership of International Ladies' Garment Workers Union, AFL-CIO, went on strike in San Antonio, Texas. The only notice which Milam had of that strike was a newspaper article which several of the officers of the company read after the strike had begun.

Subsequently, on March 6, 1959, at a time when there was no dispute whatever between Milam and its employees, none of whom were members of the union, and when there was no request that Milam take over or aid the strike-bound plant of Texson, pickets, under the direction of Russell McMahon, business agent of International Ladies' Garment Workers Union, who was acting under orders from the Atlanta office of the union, appeared along the receiving driveway at Milam's with signs which read: "Texson-Milam Mfg. Co. on strike. International Ladies' Garment Workers, AFL-CIO". McMahon admitted that he was sent to Tupelo by his superiors for the purpose of directing "a strike, a picket line;" that he brought the "plackets" with him and wrote the above mentioned words thereon; that he was informed that some people would meet him in Tupelo, and that five did so; that he knew that the employees of Milam were not on strike, "but I didn't know the connection that might be

hatched up between Milam and Texson"; and that he supervised and directed the picketing, but that he carried no picket sign himself.

The truck lines, and other common carriers, which had previously handled Milam's incoming and outgoing shipments, refused to cross the picket lines which were established in front of the receiving entrance of the factory, with the result that all of such shipments were stopped. Consequently, on March 8, 1959, Milam rented a truck in order to get fabric into the plant and garments out of the plant to the carriers. The pickets observed everything that was done. They watched the loading and unloading; and had a little black book in which they were constantly writing. According to A. B. McConnell, Vice-President of Milam, every time the rented truck left the plant, two of the pickets followed it in a bluish, green Ford, with an Alabama license. He was certain of this because he said that, each time, he followed the Ford.

On one occasion, a Malone truck, with a shipment for Milam, was stopped at the front. Pickets talked to the driver and he left. McConnell and Paul Eason went out in search of the driver and found him at a service station, calling his home office in Birmingham. They finally persuaded the driver to return to the plant with Eason getting in the truck and accompanying the driver inside. After the truck was unloaded, the driver was afraid to cross back over the picket line and leave. So Eason rode out in the truck with him as far as the weighing station east of Fulton. McMahon and another picket followed them in the same Ford car all of that distance.

Appendix D

On another occasion, after North Mississippi Shippers Association had been employed by Milam to handle its freight, and one of its trucks was being loaded at the west entrance loading dock, a car, from which McMahon disembarked, was parked on the wrong side of the street in front of the truck, so blocking the way that it was extremely difficult for the truck to get out of the yard. In fact it took ten to fifteen minutes for the driver to get his truck out of the plant, and this was not accomplished until after the truck collided with the car and then the driver of the car moved it. Notwithstanding an injunction was issued on March 20, 1959, picketing, by parties not named as defendants therein, continued; and, on April 6, 1959, another injunction was ordered to be issued. In both cases the injunctions prohibited picketing.

Robert Cohn, staff attorney for Local 180 of International Ladies' Garment Workers Union, of Atlanta, Georgia, admitted that, on April 17, 1959, he filed with National Labor Relations Board a charge of unfair labor practice against Milam. The union did not prosecute the proceedings on this complaint, and subsequently withdrew it.

The appellants assigned a number of alleged errors, but these have been compressed into the following contentions: (1) The controversy here was exclusively within the jurisdiction of the National Labor Relations Board, and the State court was without power to afford any relief whatever. (2) The final decree was in violation of the rights of the appellants, under the constitutions of both the State and Federal

Governments. (3) The International Ladies' Garment Workers Union is unincorporated and was not properly before the court. And (4) certain procedural actions.

It is true that, where there is a labor dispute affecting interstate commerce within the purview of the Labor Management Act of 1947, the jurisdiction of the controversy is vested in the National Labor Relations Board. 29 U. S. C. A., Sec. 151 et seq.; *Garner* v. *Teamsters C. & H. Union,* 346 U. S. 485, 74 S. Ct 161, 98 L. Ed. 228; *P. S. Guss, d/b/a Photo Sound, etc.* v. *Utah Labor Relations Board,* 353 U. S. 1, 77 S. Ct. 598, 609, 1 L. Ed. 2d 601; *Youngdahl* v. *Rainfair,* 355 U. S. 131, 78 S. Ct. 206, 2 L. Ed. 2d 151; and other authorities too numerous to mention. That principle has been recognized by this Court in *Southern Bus Lines, Inc.* v. *Amalgamated Association of * * * Employees of America, et al.,* 205 Miss. 354, 38 So. 2d 765; *United Brotherhood, etc.* v. *Pascagoula Veneer Co.,* 228 Miss. 799, 89 So. 2d 711; *International Woodworkers* v. *Fair Lumber Co.,* 232 Miss. 401, 99 So. 2d 452; *Fishermen & Allied Workers* v. *Quaker Oats Co.,* 235 Miss. 401, 109 So. 2d 321.

29 U. S. C. A., Sec. 152, subsection (9) provides as follows: "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment regardless of whether the disputants stand in the proximate relationship of employer and employee."

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The above subsection (9) is an exact rescript of 29 U. S. C. A., Sec. 113(*c*), p. 128, which was under consideration in *Columbia River Packers Assn.* v. *Hinton, et al.*, 315 U. S. 143, 86 L. Ed. 750, 62 S. Ct. 520. Although the fish sellers were called a union and were affiliated with a national labor organization, actually they were independent operators; and it was held that a suit by the buyers of their fish, under the Sherman Act, was not a "labor dispute" within the meaning of the Norris-LaGuardia Act. The opinion said that this did not place in controversy the wages or hours or other terms and conditions of employment of the employees. It was therein said: "We recognize that by the terms of the statute (the Norris-LaGuardia Act) there may be a 'labor dispute' where the disputants do not stand in the proximate relation of employer and employee. But the statutory classification * * * does not expand the application of the Act to include controversies upon which the employer-employee relationship has no bearing." The opinion explained that, by the Norris-LaGuardia Act, the attention of Congress was focused upon "disputes affecting the employer-employee relationship, and that the Act was not intended to have application to disputes over the sale of commodities." See also *Carpenters and Joiners Union, etc.* v. *Ritter's Cafe*, 315 U. S. 722, 62 S. Ct. 807, 86 L. Ed. 1143.

In the present case, there was no employer-employee relationship between Milam and the strikers or the pickets. After all, they were simply irate because Milam had been delivering their employer .0230 to .1257 percent of its production.

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In *Fishermen and Allied Workers* v. *Quaker Oats Co., supra*, this Court recognized that there was in fact, a labor dispute in that case. The appellants had begun to fish for the appellee in 1952. There was cooperation between the parties, and each boat was limited to five tons per trip. Then Castigliola came into the picture, ostensibly buying fish from the boat owners and selling it to Quaker. Outside boats were brought in and were permitted to sell three to five times as much fish as the local boats. It appeared that, even if Castigliola was in fact an independent contractor, at the same time, fish was unloaded and weighed at Quaker's plant just as had been previously done. Since legitimate complaints as to working hours, to safety factors, to inaccurate scales, and to deductions on account of insurance and radio facilities, could and did arise at the place of unloading—the same place where the fishermen had delivered their fish before the appearance of Castigliola—this Court held that there was a labor dispute in contemplation of Federal law. Inasmuch as the picketing was peaceful in that case, it was held that the State court had no jurisdiction. Besides in that case, the scene was Pascagoula, Mississippi. All of the affected parties lived there. There was no difference in the place and manner of delivery of the fish and the attendant circumstances before and after Castigliola's appearance. To all intents and purposes the system was the same.

But, in the present case, people from other states, some of them living hundreds of miles away, came to Tupelo, Mississippi. These men and women did not work for Milam. It was not shown that any of them had ever worked for Milam. There had been peace and

quietude at Milam's—no labor dispute, or dispute of any kind, existed between Milam and its employees. Some of these outsiders had worked for Texson, but others had not even been in its employ. There was no evidence that Milam was helping to break a strike at Texson, or that these people were trying to form a union, or trying to get the employees of Milam to join a union, or that they were trying to coerce Milam into influencing its employees to join a union.

Certain particular circumstances should be pointed out in the hereinafter mentioned cases, cited and relied on by the appellants:

In *Youngdahl* v. *Rainfair, supra*, Rainfair's trouble was with its own employees, none of whom actually belonged to a union, but many of whom had signed applications to join. Twenty-nine workers failed to report and a picket line was established in an effort to compel the employer to recognize the union.

In *Garner* v. *Teamsters C. & H. Union, supra*, four of Garner's twenty-four employees, belonged to the Teamsters Union. A picket line was thrown up, and the signs, borne by the pickets, read as follows: "Local 776 Teamsters Union (A. F. of L.) wants Employees of Central Storage & Transfer Co. (Garner's trade name) to join them to gain union wages, hours and working conditions."

In *Guss, d/b/a Photo Sound Products Manufacturing Co.* v. *Utah Labor Relations Board, supra*, the United Steelworkers of America was certified as the bargaining agent for the employees of Guss, and the union filed charges with the Acting Regional Director of the National Board to the effect that Guss had engaged in certain proscribed unfair labor practices.

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The Director declined to issue a complaint. The Union then filed like charges with the Utah Labor Relations Board, which found that Guss had engaged in such practices. The Supreme Court of Utah affirmed. 5 Utah 2d 68, 296 P. 2d 733. The judgment was reversed by the Supreme Court of the United States and the case went off on the ground that the National Board had not ceded its jurisdiction.

In *San Diego Building Trades Union* v. *Garmon*, 353 U. S. 26, 77 S. Ct. 607, 609, 1 L. Ed. 2d 618, the respondents, operating lumber yards in San Diego County, California, had purchased more than $250,000 worth of material outside of California to be sold at retail. They refused to sign a contract with the petitioner unions, including a union shop, because a majority of the employees had not selected a union as their bargaining agent. Then "The unions commenced peaceful picketing to enforce their demand." Respondents sought an injunction in the state court, and filed a petition with the Regional Director of the National Board, asking that the representation of their employees be resolved. The injunction was granted and the California Supreme Court affirmed. But the Supreme Court of the United States, under the principle announced in the Guss case, supra, that is, that there was no session of jurisdiction by the National Board, vacated the judgment.

In other words, in the *Youngdahl*, *Garner*, *Guss* and *Garmon* cases, supra, cited and relied on so strongly by the appellants, in each instance, there was a "labor dispute" between the employers and their employees, or the representatives of such employees. From the

appellants' citation of authorities, the Court has been unable to find a case in which it has been held by the Supreme Court of the United States that a "labor dispute" arises under the Labor Management Act of 1947 where no employer-employee relationship whatever exists or where such relationship is not susceptible of existing. Certainly this cannot be law when, in a case such as this, the director and the participants in the picket line were wholly alien to both the employer and the employees of Milam.

The Court is, therefore, of the opinion that there was no "labor dispute" within the purview of the Labor Management Act of 1947.

In a labor dispute, picketing, if peaceful, is lawful. However, if it is not peaceful, the state court may intervene. Always the question for determination is whether the picketing is peaceful. See 70 C. J. S., Picket; Picketing, p. 1052, where it is said: "In peaceful picketing there is an entire absence of fraud, violence, or anything of an intimidating nature, and it is characterized by peaceful persuasion for the promotion of a lawful purpose." See also *Triangle Finishing Corp.* v. *Textile Workers*, 145 N. Y. Supp. 2d 614, where it is said: "Picketing to be peaceful must be free, not only of violence, but also free of any intimidation, free of any form of physical obstruction or interference." See also *Meltex, Inc.* v. *Livingston, et al.*, 145 N. Y. Supp. 2d 858, where it is said: "* * * picketing, in order to be peaceful, must be free, not only of violence, but also, of *any* unlawful act, i.e., free of intimidation of customers, free of any form of physical obstruction or interference with business, and free

of any misrepresentation of the facts of the controversy. *Senn* v. *Tile Layers Union*, 301 U. S. 468, 479, 57 S. Ct. 857, 81 L. Ed. 1229."

The use of force to gain the desired end constitutes an attempt to usurp a governmental function. The state, in the exercise of its police power, may, by injunction, protect persons and property from damage by violence and "from fear through threats and intimidation." *Southern Bus Lines Inc.* v. *Amalgamated Association of * * * Employees, supra.* See also *United Brotherhood, etc.* v. *Pascagoula Veneer Co., supra; International Woodworkers* v. *Fair Lumber Co., supra; Fishermen & Allied Workers* v. *Quaker Oats Co., supra; Allen Bradley Local, et al.* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 62 S. Ct. 820, 86 L. Ed. 1154; *United Automobile, etc.* v. *Wisconsin Employment Relations Board*, 351 U. S. 266, 76 S. Ct. 794, 100 L. Ed. 1162.

In *Youngdahl* v. *Rainfair, supra*, the Supreme Court of the United States held that the Arkansas Court could lawfully enjoin the union and others from threatening or provoking violence and from obstructing or attempting to obstruct the use of the streets adjacent to the employer's place of business and the free ingress and egress to and from the property. In *San Diego Trades Union* v. *Garmon, supra*, and in *Plumbers* v. *County of Door*, 359 U. S. 354, 79 S. Ct. 844, 3 L. Ed. 2d 872, it was specifically found that the picketing was peaceful. In *Hotel Employees Union, etc.* v. *Sax Enterprises*, 358 U. S. 270, 79 S. Ct. 273, 3 L. Ed. 2d 289, it was pointed out that in none of the twelve Florida cases, which were then being reviewed, was there any finding of violence, while in some, there was an express finding of no violence.

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The appellants in this case, pursuant to their purpose and intent to "hatch up" a connection between Milam and Texson, perpetrated a great fraud upon Milam when they paraded before its entrances with signs, which announced "Texson-Milam Mfg. Co. on strike. International Ladies' Garment Workers Union AFL-CIO," since they well knew at the time that the charge was false and that there was no dispute whatever between Milam and its employees and that the employees of Milam were not on strike. While they did not beat up anyone or utter aloud words expressing their intent to do so, at the same time, it must be remembered that they observed everything that was being done and constantly wrote in the little black book. They even followed Milam's rented truck when it left the plant to obtain fabric or to make deliveries to public carriers. Paul Eason, the director of traffic for Milam, said that their conduct made him nervous and that the driver of the truck for the Malone Company was so badly frightened that he drove away from the plant and it was necessary for Milam's officers to go in search of him, and, when he was found, to ride into and out of the plant with him. Besides, as these officers accompanied him for a considerable distance, two of the men, who were acting as pickets, followed in their car, and McConnell felt it was necessary to secure a State Patrolman to give safe conduct to the State line. When does conduct amount to coercion or intimidation? It is always for the triers of fact or the jury to determine whether conduct constitutes an overt act against which defense can be rightfully made. This Court has said that no definition of an "overt act" can

be given. "It may be a motion, a gesture, conduct, or demonstration, or anything else which evidences reasonably" such design. And again that "trifles light as air when viewed alone may become fraught with deadly meaning when viewed in connection with all the preceding facts * * *." *Hood, et al.* v. *State*, (Miss.), 27 So. 643. In *Youngdahl* v. *Rainfair, supra*, the Supreme Court of the United States in citing *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 86 L. Ed. 1031, 62 S. Ct. 766, as authority for the statement that "Words can readily be so coupled with conduct as to provoke violence", made this further observation: "But if a sufficient number yell any word sufficiently loudly showing an intent to ridicule, insult or annoy, no matter how innocuous the dictionary definition of that word, the effect may cease to be persuasion and become intimidation and incitement to violence." When, to the foregoing described conduct of the pickets, there is added the act of one of them in parking his car in such manner as to block, for a time, the big truck that was trying to depart from Milam's plant, this Court is unable to say that there is not substantial evidence to sustain the learned trial court in enjoining the picketing because of coercion and intimidation.

But, the appellants say, the injunction against picketing on their part denies their constitutional right of free speech.

The case of *Carpenters & Joiners Union, etc.* v. *Ritter's Cafe, supra*, seems to be the answer to that question. Ritter was the owner of Ritter's Cafe. He made a contract with Plaster to erect a building about one

and one-half miles from his cafe. Because Plaster employed nonunion labor, members of the appellant union began to picket Ritter's Cafe. Their object, in so doing, was to compel Ritter to require Plaster to employ only members of the union. Members of all trades-unions refused to cross the picket line and Ritter suffered a curtailment of 60 percent in his business. The state court enjoined the picketing of the cafe. In upholding that action, the Supreme Court of the United States said: "As a means of communicating the facts of a labor dispute, peaceful picketing may be a phase of the constitutional right of free utterance. But recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute. Restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication. To deny to the states the power to draw this line is to write into the Constitution the notion that every instance of peaceful picketing—anywhere and under any circumstances—is necessarily a phase of the controversy which provoked the picketing. Such a view of the Due Process Clause would compel the states to allow the disputants in a particular industrial episode to conscript neutrals having no relation to either the dispute or the industry in which it arose."

Under the First Amendment to the Constitution of the United States, Congress can make no law abridging the freedom of speech, and this restriction is extended to the states by the Fourteenth Amendment. Also, by Section 13, Article 3 of the Mississippi Con-

stitution of 1890, freedom of speech is to be held sacred in this state. However libel is not licensed under the guise of free speech. The right of prosecution for libel is given in that section. See also Sec. 2268, Code of 1942, Rec.

Appellants contend that International Ladies' Garment Workers Union, being an unincorporated association, was not properly before the court.

Without reference to whether the union was properly served with process, the fact remains that it entered its appearance in the cause. In the answer and demurrer, it was said: "Now come Russell McMahon, Elmer Smith, Carmel Hayes and the International Ladies Garment Worker's Union, AFL-CIO, Defendants in the above styled cause, and for answer to the original bill for injunction say:". There was a prayer by the defendants for dismissal of the original bill, with the signature of Anthony J. Sabella, "Attorney for Defendant". The service of process and, other related matters are precluded by reason of the appearance of this defendant, as stated above. *Miss. Central Railroad Co.* v. *May*, 149 Miss. 334, 115 So. 561; *Finklea Bros.* v. *Powell*, 189 Miss. 454, 198 So. 293.

The complainant, at the close of its evidence, moved the court to cite the defendants for contempt and to fix a date for the hearing. The court deferred action thereon. The appellants assigned this as error, and contend that the court should have specifically overruled this motion.

"A contempt proceeding is sui generis * * * and * * * even a breach of an injunction *may* be punished before the equities in the principal case are set-

tled * * *." 12 Am. Jur., Contempt, Sec. 66, p. 433. (Emphasis supplied.) While the breach may be punished before the equities are settled, there appears to be no good reason why this may not be done after the equities are settled. The Court is of the opinion that it is within the discretion of the trial court to determine if and when a charge for alleged contempt of court shall be heard.

The appellants contend that this cause was taken under advisement on May 7, 1959; that the final decree was not entered until January 14, 1960, more than six months from the date that it was taken under advisement; and that, therefore, under Sec. 1650.5, Code of 1942, Rec., the decree is invalid.

The above statute provides as follows: "All chancellors or judges of the chancery and circuit courts of the State of Mississippi shall render their final decree on any and all matters taken under advisement by such chancellors or judges not later than six (6) months after the date when same are taken under advisement or not later than six (6) months after the date on which the chancellors or courts or judges set as the date when the final brief or memoranda of authority is required to be filed on or as to the cause taken under advisement, whichever is the latest date after the date on which the cause or case is taken under advisement."

While Sec. 1650.5 does fix a time for the rendition of decrees and judgments, it does not invalidate the same where such decrees and judgments are not rendered within that period of time. In *McMahon* v. *Milam Manufacturing Co.*, 237 Miss. 676, 115 So. 2d 328, this Court denied a petition and application by

the appellants for a writ of certiorari to require the chancery clerk to send up the records in the case. The reason for the denial was that no decree had been rendered. But the opinion also observed "that the Court still has authority to render a final decree in the cases at a future regular term of the said chancery court." That opinion was handed down on November 9, 1959, and a final decree was thereafter entered on January 14, 1960, as stated above. Hence, the appellants' contention in this respect must be overruled.

It therefore follows that the decree of the trial court must be affirmed.

Affirmed.

Kyle, Arrington, Ethridge and Rodgers, *JJ.*, concur.

APPENDIX E

Opinion of Chancery Court, Lee County, Mississippi, Issued January 14, 1960

This is a suit by Miliam Manufacturing Company against The International Ladies Garment Worker's Union, A.F.L.-C.I.O. and certain members of said union seeking to enjoin said defendants from picketing and causing to be picketed the plant of Miliam Manufacturing Company located in the City of Tupelo, Miss.

The proof in this case shows that Miliam Manufacturing Company is now and has been for many years engaged in the business of manufacturing ladies garments. It further shows that for several years Miliam has devoted from 10 to 12 per cent of its total production to work for Tex-Son Manufacturing Company located in San Antonio, Texas. The work done for Tex-Son Manufacturing Company is and has been on a cut and trim basis with Tex-Son furnishing the materials and Miliam cutting the garments ordered and finishing them. A part of the plant of Miliam is set up in a manner to take care of the orders from Tex-Son. When the garments are finished they are shipped by Miliam as directed and then Miliam bills Tex-Son for the work done according to their agreement. Tex-Son in no way supervises the work done by Miliam and only occasionally does a representative of Tex-Son visit the Miliam plant and then only as a visitor or customer and not in a supervisory capacity.

The proof further shows that none of the Miliam stockholders hold any stock in Tex-Son and none of the Tex-Son stockholders hold any stock in Miliam.

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There are no mutual directors or employees or officers. Their only relationship is the one set out above.

It appears from the evidence that in February 1959 the employees of Tex-Son who were members of the defendant labor union went on a strike because of a labor dispute with Tex-Son. Then on March 6, 1959 four of the defendants in this case who are members of the local Union in Florence, Alabama began picketing the Plant of Miliam in Tupelo, Mississippi. These pickets were under the direction of Russell McMahan, a representative of the International Union. These pickets carried a sign that read: "Tex-Son-Miliam Manufacturing Company on strike", at that time Miliam had no dispute with its employees and its employees crossed the picket line and continued their work. However, the Truckers located in Tupelo who were members of the Union refused to pick up shipments or bring shipments into the plant. One truck driver from Birmingham after persuasion did cross the line and the presence of McMahan and the pickets caused him to request the representatives of Miliam to escort him out of town. The proof shows that McMahan and one of the pickets followed him for some 25 miles until he stopped as the scales East of Fulton. After this instance Miliam Manufacturing Company filed its original Bill in Cause No. 15,813, and after notice was given a hearing was had on its request for a temporary injunction. The defendants including The International Ladies Garment Worker's Union, A.F.L.-C.I.O. appeared and answered and denied that Miliam was entitled to a temporary injunction. After the hearing an order was entered directing the issu-

ance of the temporary injunction against all defendants including the International Union.

In spite of this order and while the injunction was in full force and effect, on April 4, 1959, other pickets appeared at Miliam plant two of which were members of Local 180 of San Antonio, Texas, a local of the International Ladies Garment Worker's Union. These pickets carried a sign which read "Tex-Son Employees on Strike, Tex-Son by utilizing some of the facilities of Miliam is attempting to destroy the Standard of Living and working conditions of Members of Local Union No. 180". Upon petition of Complainant a temporary injunction was issued enjoining these pickets from further picketing. This petition should have been filed in the original suit but was not so filed but was filed as a separate suit and is cause No. 15,836. However the petition is such that it is clearly a supplemental bill to the bill in cause 15,813 and no one could be mislead by it being filed as a separate suit. After these pickets from local 180 were enjoined other pickets appeared, and began picketing Miliam. These pickets were then enjoined under a supplemental petition in Cause 15,836. This supplemental petition should have been filed in cause 15,813 but it likewise shows on its face that it was intended to be a supplemental petition in cause 15,813 and no one has been mislead thereby. These last pickets carried the same sign as the second group, but had removed therefrom the words "Local Union No. 180".

The defendants then filed pleadings in these cause wherein they raise many points. Many of which are technical and do not in any way effect the merits of

this cause. The Court in this opinion will only discuss those which this Court deems to be important and all other will be overruled.

The first question stress by counsel for the defendants in their able brief is the question of jurisdiction of this Court. It is the contention of the defendants that the controversy here is a labor dispute involving interstate commerce within the purview of the Labor Relation Act and that this Court is without jurisdiction because such jurisdiction was by this act vested exclusively in the National Labor Relations Board. They cite in support of this contention many cases including the recent case decided by the Supreme Court of Mississippi of "Fisheman and Allied Workers, etc. versus Quakers Oats Company 199 So. 2nd 321. However the facts in this are unlike the facts in any case cited by the defendants. In the case now before the Court there is no labor dispute between Miliam and its employees and neither is there any labor dispute between Miliam and the defendants in this case. From the facts in this case the picketing here could have had only one purpose and that was to stop common carriers from bringing in supplies to Miliam and to prevent Miliam from sending out shipments. It was designed solely to damage Miliam and to prevent it from doing work for Tex-Son which had done for many years. The garments made by Miliam were never made at its San Antonio plant and Miliam's volume for Tex-Son had not been increased to take on any work performed by Tex-Son in its Texas plant. Certainly it was not an effort by the Union to bring Miliam's employees into their organization and it

appears not to have been an effort to inform the public of any information. The information given by the pickets on their signs was false and the defendants knew it was false. Therefore it appears to this Court that this picketing was designed to hinder Miliam from carrying on its business who was no way connected with dispute with Tex-Son. It is the opinion that the picketing in this case was not for a lawful purpose.

Our Court also has held that the Court has the authority to enjoin any picketing that is not peaceful. The picketing in this case was not peaceful picketing. It is true that no violence was used and very little intimidation was involved, but the information given to the public was false and defendants knew it was false.

Certainly under the facts in this case no one could seriously argue that Miliam was not entitled to injunction relief from this situation. Therefore unless this Court is without jurisdiction the injunction should be made permanent.

There seems to have been much doubt about the area in which a State Court has jurisdiction in labor natters since the passage of the Labor Management Relations Act of 1947. This has to some extent been cleared up by very recent Federal legislation. Under this Act and labor dispute that involves interstate Commerce the Labor Relations Board has exclusive jurisdiction. It is true in this case that Miliam is engaged in interstate Commerce. The question therefore is whether there is a labor dispute in this case that brings it within the meaning of this Act. This

Court thinks not although the definition of a labor dispute as set out in the Act is very broad and includes disputes where the disputants do not stand in the proximate relationship of employer and employees. What we have in this case is not a labor dispute at all but an attempt on the part of the Union to prohibit Miliam from carrying on its business and to prevent it from doing business with a firm they do have a dispute with. The picketing here had no lawful purpose and could have been designed only to prevent Miliam from doing business with Tex-Son as they had in the past.

To sum up this rambling opinion, it is the opinion of this Court that under the facts of this case this is not a labor dispute and the National Labor Relations Board does not have exclusive jurisdiction of this case. It is further the opinion of this Court that even if this action on the part of the Union could be termed a labor dispute, this Court still has jurisdiction to enjoin these defendants for the reason the picketing was not lawful and was not peaceful.

The temporary injunction will be made permanent.

Upon the hearing of this cause a motion was made to punish the defendants for contempt of Court for the violation on the injunction. This Court reserved ruling on that motion and no decision will be made on that motion at this time. It will be disposed of at some future date, but it in no way shall interfere with the entering of the final decree on the merits of this issue at this time.

A decree will be prepared in accordance with this opinion and the costs will be taxed against the defendants.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 218

RUSSELL McMAHON, et al.,
Petitioners

v.

MILAM MANUFACTURING COMPANY
Respondent.

BRIEF OF RESPONDENT ON PETITION FOR WRIT OF CERTIORARI

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POINT NO. 1

The Picketing was not peaceful.

At the outset, we take issue with the statement of Petitioners as to the question presented in this case. On Page 2 of their Petition, Petitioners, in order to invoke the jurisdiction of this Court, state that this case presents the question of whether a State Court may enjoin peaceful picketing.

This statement is made in complete disregard of the finding of the Chancery Court of Lee County, Mississippi. The decree from which the appeal was taken to the Mississippi Supreme Court is attached as Appendix A to this brief. In that decree, the Chancellor stated:

> "Even if a labor dispute had existed, the picketing was unlawful because it was not peaceful picketing."

This finding of fact by the Chancellor was ignored by Petitioners on their appeal to the Mississippi Supreme Court, and the contention was made in that Court that the decree enjoined peaceful picketing. However, the Mississippi Supreme Court held that this finding of fact by the Chancellor was supported by substantial evidence. The Mississippi Supreme Court stated:

> ". . . this Court is unable to say that there is no substantial evidence to sustain the learned trial court in enjoining the picketing because of coercion and intimidation."

Petitioners are well aware that picketing which is not peaceful may be enjoined by the State Court, and in an effort to wipe out this line of authority with a stroke of the pen, Petitioners ignored the finding of fact by the Chancellor throughout their petition. On Page 4, they state that the picketing was at all times completely peaceful. On Page 6, they state that the decree banned all picketing, and this statement is repeated on Page 7 of the petition and also on Page 9. On Page 10, Petitioners again state that the picketing was "altogether peaceful", and on the same page, they make further reference to a ban on peaceful picketing and a ban on all picketing. The Chancellor specifically found on substantial evidence that the picketing was not peaceful and was, therefore, illegal, and the decree bans illegal picketing.

The finding of fact that the picketing was not peaceful was made by the Chancellor, who heard all of the testimony, observed the witnesses on the stand, judged their credibility and the weight of their testimony. The Chancellor found both in the opinion and in the decree that the information

conveyed to the public by the pickets was false and was a complete misrepresentation of the actual facts. The sign carried by the first group of pickets informed the public that Milam employees were on strike. All of the witnesses testified that Milam employees were not on strike, and there was actually no dispute between the company and its employees. Each of the pickets who carried this sign testified that they knew the information was incorrect. The sign carried by the second group of pickets was also completely misleading and a misrepresentation of fact. The information on this sign was intended to convey to the public that Texson was using the facilities of Milam Manufacturing Company as a means of breaking the strike at its own plant. The testimony revealed to the contrary, and in his opinion the lower Court found, from the proof, that Milam had devoted ten to twelve per cent of its total production to doing work for Texson over a period of years. That this work was on a cut, make and trim basis, and was carried on without supervision from Texson. That there was no other relationship existing between the companies. That the garments made by Milam for Texson were never made at its San Antonio plant, and that the volume of the work done by Milam had not been increased to take on any work which had been performed at the strike-bound plant. These findings of fact are fully supported in the testimony of L. G. Milam and the testimony of A. R. McConnell. In addition to the misrepresentation of facts, there was evidence that trucks were stopped (R. 190), and all shipments to the plant were stopped. (R. 218) There was evidence that the pickets made a practice of following any trucks which either made a delivery or picked up a shipment. (R. 189, 190, 191, 197, 219, 220) In one instance, the driver became so frightened that he asked for an escort away from the plant and then found that his truck was being followed by two

of the pickets. This following continued past Fulton, Mississippi, more than twenty miles away, at which time the driver was so fearful for his safety that he requested a State Highway Patrol escort, both from the State of Mississippi and the State of Alabama. (R. 191, 192, 199, 200, 201) There was also evidence that the driveway to the plant was blocked and the owner of the truck which was blocked in the drive asked for a police investigation of the matter. (R. 222, 223, 249) The Record plainly shows that the great weight of the evidence supports the factual finding of the Chancellor that the picketing was not peaceful. However, Petitioners seem to think that any picketing which is not accompanied with actual physical violence is peaceful.

Many Courts have held that such is not the case. In 70 C.J.S. Page 72, it is stated:

> "In peaceful picketing there is an entire absence of fraud, violence or anything of an intimidational nature, and it is characterized by peaceful persuasion for the promotion of a lawful purpose."

In the case of Senn. vs. Tile Layers Protective Union, 301 U.S. 468, 57 S. Ct. 857, 81st L. Ed. 1229, this Court was considering the words, "peaceful picketing", as contained in a Wisconsin statute. This Court said:

> "That terms as used implies not only absence of violence, but absence of any unlawful action." This Court further said: "The picketing was peaceful; the publicity did not involve a misrepresentation of fact."

Petitioners have chosen to define the picketing in the instant case as peaceful rather than following the finding

of fact of the lower Court. Petitioners have not cited one case which holds that the picketing carried on in the instant case as described in the finding by the lower Court was peaceful.

In the case of Gomez vs. United Office and Professional Workers, 73 Fed. Sup. 679, the District Court for the District of Columbia held that the use of misleading statements by pickets constituted a method involving fraud and could, therefore, be enjoined.

In the case of Cafeteria Employees Union, Local 302 vs. Gus Angelos, et al, 320 U.S. 293, 88 L. Ed. 58, false representations and acts of coercion were held not protected by the Constitution. This Court stated:

> "In a setting like the present, continuing representations unquestonably false and acts of coercion going beyond the mere influence exerted by the fact of picketing, are of course not constitutional prerogatives."

The New York Court has defined peaceful picketing in the following cases: Triangle Finishing Corporation vs. Textile Workers Union, 145 New York Sup. 2d 614, Mel-Tex, Inc. vs. Livingston, 145 New York Sup. 2d 864. The Supreme Court of Mississippi, in referring to the action of the pickets in the instant case, stated:

> "The Appellants in this case, pursuant to their purpose and intention to "hatch up" a connection between Milam and Texson, perpetrated a great fraud upon Milam when they paraded before its entrances with signs which announced, 'Texson—Milam Manufacturing Company on Strike'."

We respectfully submit that the question presented on the Petition for Certiorari is whether this Court will review the decision of a State Court where there is a direct finding that the action of the pickets constituted a fraud and that the picketing was not peaceful. We respectfully submit that the right of the State Court to enjoin such picketing is so well established that it does not require review by this Court.

In the case of Milk Wagon Drivers Union vs. Meadowmoor Dairies, 312 U.S. 287, 61 S. Ct. 552, 85 L. Ed. 836, this Court considered a case in which the Supreme Court of Illinois affirmed an injunction against picketing. In that case, the importance of the finding of fact by the State Court was recognized in these words:

> "We have not only his findings but his findings authenticated by the state of Illinois speaking through her supreme court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guaranty here invoked. The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. To substitute our judgment for that of the state court is to transcend the limits of our authority."

In Hotel Employees Union vs. Sax Enterprises, 358 U.S. 270, 79 S. Ct. 273, 3 L. Ed. 2d 289, this Court stated that there was no finding by the Florida Court that the picketing was other than peaceful.

POINT NO. 2

The picketing did not grow out of a labor dispute involving Respondent.

The Chancellor based his jurisdiction on two points, holding that there was no labor dispute and that even if a labor dispute was involved, then he had jurisdiction to issue the injunction because the picketing was not peaceful.

The Supreme Court of Mississippi upheld the lower Court on both grounds. The Supreme Court of Mississippi is familiar with the doctrine of preemption by the National Labor Relations Board in matters involving labor disputes. This doctrine was fully discussed by the Mississippi Supreme Court in the case of Fisher & Allied Workers vs. Quaker Oats Company, 235 Miss. 401, 109 So. 2d 321. The doctrine was followed in that case even though the pickets did not stand in relationship as employees of the company. The cases relied upon by Petitioners were cited in Petitioners' brief in the Mississippi Supreme Court and were duly considered in the lengthy opinion of the Supreme Court in which the cases were differentiated from the facts of the case at bar.

No case is cited by Petitioners going as far as the Court would have to go in this case to hold that the picketing grew out of a labor dispute.

Petitioners recognized that fact and tried the case in the lower Court on the theory that it would be necessary to involve Milam Manufacturing Company in some way in the labor dispute.

In the answer filed to the original bill the Defendants alleged that they had a labor dispute with the Texson Manufacturing Company and that such dispute also existed with Milam Manufacturing Company as the alter ego of Texson. The Defendants sought to show that Milam was involved by having taken over production from the strike-bound Texson plant. The proof showed clearly that the garments which Milam was manufacturing for Texson were the same garments which had been manufactured since 1957 and that the Company had not in fact taken over any production of the strike-bound plant. (R. 128, 176, 177) The proof also showed that sales to Texson in March and April, 1958, totaled $22,000.00 and sales to Texson in March and April, 1959, totaled $19,008.00. (R. 125) Instead of a large increase in business resulting from the strike the record showed that sales had actually decreased and the forecast which was made up to show cutting orders from Texson showed that in April, 1958, cutting orders totaled 27,732 dozen, whereas in April, 1959, cutting orders totaled 21,297 dozen. (R. 216) In other words, there was actually a reduction in sales of completed merchandise and there was also a reduction in cutting orders for future manufacture.

Before the trial on the merits the defendants filed separate answers in addition to the joint answer which was filed at the hearing on the preliminary injunction. In the separate answers defendants stated:

> "This Defendant is informed and believes that the total production by the complainant for and on behalf of the Texson Company is greatly in excess of ten to fifteen per cent; that the major portion of the manufacturing now being done by the complainant is for and on behalf of Texson Company. This defendant is in-

formed and believes that the manufacturing of womens garments by the complainant for the Texson Company has greatly and materially increased from on or about February 23, 1959, when the employees of the Texson Manufacturing Company became engaged in a lawful and legal strike against that said company. This defendant is informed and believes that a substantial portion of the manufacturing facilities of the complainant, at all times mentioned herein, are utilized and devoted to the manufacture of garments for the said Texson Company, and that a substantial number of the approximately 216 persons employed by the complainant are engaged in the production of garments for the Texson Company. This defendant is informed and believes that the complainant's employees are performing work for the strike bound Texson Company, and that substantial portions of the work since February 23, 1959, and now being performed by the complainant for the said Texson Company is work which would otherwise have been done by the employees of Texson who are on strike, and that the complainant at all times mentioned herein knew that there existed a labor dispute and strike between Texson and its employees and knowingly and willingly performed the work of manufacturing garments for the said Texson Company. This defendant charges and avers that the complainant, Milam Manufacturing Company, and the Texson Manufacturing Company are so closely allied as to make the complain herein an "ally" with Texson in the labor dispute existing between Texson and its employees, and that as such the compainant is in the same position thereasto as the Texson Company. That because of said alliance with Texson in the manner set forth herein that the complainant is a party to said labor dispute.

> . . . This defendant charges and avers that the complainant, Milam Manufacturing Company, is engaged in producing and shipping goods in interstate commerce, and that there exists a labor dispute between the complainant and defendants including a controversy concerning terms, conditions of employment and concerning the association and representation of persons seeking to arrange terms and conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employees."

These facts alleged by Petitioners as the basis for a requested holding by the State Court that jurisdiction was vested solely in the National Labor Relations Board were not proven. The facts as shown by the Record and as found by the Court are entirely to the contrary.

In the present Petition, most of the facts set up in the answer as quoted above are omitted, and Petitioners are apparently now relying on the proposition that Milam was a party to Texson's dispute with Texson employees because Milam had through the years done a small amount of work for Texson. It is respectfully submitted that Petitioners cannot set up a state of facts as a basis for action by the lower Court and then, when they utterly fail to prove such facts, adopt some different theory as a basis for action by this Court.

In the case of Gomez vs. United Office and Professional Workers of America, 73 Fed. Sup. 680 cited above, the District Court for the District of Columbia was considering the question of whether picketing grew out of a labor dispute as defined under the Norris-LaGuardia Act. A dispute

existed in New York, and pickets appeared in Washington, D.C. carrying signs which indicated that the plaintiff in Washington was a party to the dispute. The District Court found that the Washington establishment was not a party to the dispute and was helpless to give the laborers any relief. He held that the picketing did not grow out of a labor dispute. The reasoning by the District Judge is entirely applicable to the position which Milam occupied in the present case. Milam was not a party to any of the grievances and was completely helpless to give any relief. In the Gomez case, the Court further stated that freedom of speech as relating to picketing is restricted within a reasonable radius of the area in which the labor dispute has arisen. The Court held that since the dispute was in New York, the District of Columbia was not within a reasonable radius. In the case at bar with the dispute existing in San Antonio, Texas, certainly Tupelo, Mississippi is not within a reasonable radius. The Supreme Court has recognized the area restriction on picketing in the case of Carpenter and Joiners Union vs. Ritters Cafe, 315 U.S. 722, 62 S. Ct. 807, 86 L. Ed. 1143.

The lower Court in this case did not enjoin all picketing, but enjoined illegal picketing. The lower Court held that the picketing in this case was illegal (1.) because it did not arise from a labor dispute to which Milam was a party, (2.) because it was not peaceful.

It is respectfully submitted that either of these grounds was sufficient to give the lower Court jurisdiction. The holding of the lower Court as to each ground is based on a finding of fact which in both instances is supported by substantial evidence. The lower Court was upheld by the Supreme Court of Mississippi as to both grounds of juris-

diction in an opinion which shows clearly that the issues now raised by Petitioners were carefully considered by the Mississippi Supreme Court.

Having based their position that the picketing was peaceful and that it grew out of a labor dispute on lengthy statements of facts which were not proven, Petitioners now want this Court to completely ignore the findings of fact and summarily reverse the decision of the Mississippi Courts. This Court has held a number of times that Certiorari will not be granted to review judgments based solely on question of fact. N.L.R.B. vs. Waterman S. S. Corp. 309 U.S. 206, 60 S. Ct. 493, 84 L. Ed. 704, U.S. vs. Johnston 268 U.S. 220, 45 S. Ct. 496, 69 L. Ed. 925.

CONCLUSION

Since both grounds for the jurisdiction of the State Court rest squarely on findings of fact and are supported by substantial evidence, we respectfully urge that the Writ of Certiorari be denied.

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CERTIFICATE OF SERVICE

I, Charles S. Tindall, Jr., one of the attorneys for Respondent, do hereby certify that I have this day served a copy of the foregoing brief by mailing air mail, postage prepaid, a copy of said brief to the attorneys for the Petitioners at their usual post office addresses as follows: Honorable Morris P. Glushien, 1710 Broadway, New York 19, New York; Honorable Robert Cohn, 1065 Gordon St., S.W., Atlanta 10, Georgia; Honorable Dixon L. Pyles, c/o Pyles and Tucker, 507 East Pearl Street, Jackson 1, Mississippi.

Witness my signature, this the_____day of August, 1961.

Charles S. Tindall, Jr.
Weinberg Building
Greenville, Mississippi

APPENDIX A

STATE OF MISSISSIPPI

COUNTY OF LEE

IN THE CHANCERY COURT THEREOF

JANUARY 1960 TERM

Nos. 15,813 and 15,836

MILAM MANUFACTURING COMPANY

Complainant

Vs.

RUSSELL McMAHAN, et al

Defendants

FINAL DECREE

Be it remembered that on this day came on to be heard the above styled causes, which were consolidated for trial by prior Order of this Court. The cases were heard on Original and Supplemental Bills, Answers thereto, Motion for dissolution of temporary injunction, proof before the Court sitting in vacation, the hearing of the matter in vacation having been agreed to by all parties, and on briefs submitted by counsel for all parties.

And it appearing to the Court that the Defendants, at the time of the hearing of the matter on Motion For

Temporary Injunction, were picketing and causing to be picketed the plant of Milam Manufacturing Company at Tupelo, Mississippi. And it further appearing that there is no labor dispute between the Defendants and the said Milam Manufacturing Company and no labor dispute between Milam Manufacturing Company and its employees. That the picketing does not grow out of a labor dispute in any manner involving the Milam Manufacturing Company and such picketing is therefore illegal.

And it further appearing to the Court that the picketing conducted by the Defendants has misrepresented facts to the public and pickets have carried signs which were known to be false and misleading. That in addition, the picketing has been carried on with implied threats of violence and the actions of Defendants have resulted in many of the carriers of supplies and cloth refusing to make deliveries to Milam Manufacturing Company. That the picketing was designed solely to damage Milam Manufacturing Company, to prevent it from carrying on its normal business operations and irreparable injury would result from the conduct of Defendants. That even if a labor dispute had existed the picketing was unlawful because it was not peaceful picketing.

It is therefore ordered, adjudged and decreed that the temporary injunctions heretofore granted in this consolidated cause be and they are hereby made permanent and the Defendants are hereby enjoined permanently from illegally picketing or causing to be illegally picketed, the plant of Milam Manufacturing Company. It is further ordered that the entry of this Final Decree shall in no wise affect the pending motion to punish Defendants for con-

tempt of court for violation of the injunction, said motion to be disposed of at some future date by proper order of this court.

Ordered, ajudged and decreed, this the 14 day of January, 1960.